

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH ROBINSON,

No. CIV.S-04-1888 GEB DAD PS

Plaintiff,

v.

ORDER

STATE OF CALIFORNIA, et al.,

Defendants.

_____/

This 42 U.S.C. § 1983 action is before the court on defendants Plumas County; Greg Hagwood; James Reichle; Jeff Cunan; and Gary McGowan's¹ motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons explained below, defendants' motion to dismiss will be granted and plaintiff's amended complaint will be dismissed with leave to amend.

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¹ These are the only remaining defendants in this action. Defendants State of California; Ira Kaufman; William Pangman; Garrett Olney; and Doug Prouty have been dismissed by earlier order of the district court. (See Order filed January 21, 2005.)

LEGAL STANDARDS

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. See North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or of any claim within it "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); see also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

In considering a motion to dismiss for failure to state a claim, the court accepts as true all material allegations in the complaint and construes those allegations, as well as the reasonable inferences that can be drawn from them, in the light most favorable to the plaintiff. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In a case where the plaintiff is pro se, the court has an obligation to construe the pleadings liberally. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of a claim that are not pled. Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992); Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

ANALYSIS

At the time defendants filed their motion to dismiss the operative pleading in this case was plaintiff's original complaint.

1 In response to defendants' motion plaintiff, who is proceeding pro
 2 se, filed an amended complaint, which he was entitled to do. See
 3 Fed. R. Civ. P. 15(a).² While in some instances the filing of an
 4 amended pleading moots a motion to dismiss, such is not the case
 5 here. As explained below, plaintiff's amended complaint does not
 6 cure the deficiencies detailed in defendants' motion. Therefore, the
 7 undersigned has considered defendants' motion to dismiss as directed
 8 at plaintiff's amended complaint.³ See Schwarzer, Tashima and
 9 Wagstaffe, Federal Procedure Before Trial, ¶ 9:262 (The Rutter Group
 10 2004) ("An amended complaint supersedes the prior complaint as a
 11 pleading. Thus, the court will usually treat the motion to dismiss
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 14 ² Under Federal Rule of Civil Procedure 15(a) "[a] party may
 15 amend the party's pleading once as a matter of course at any time
 16 before a responsive pleading is served" A motion to dismiss is
 17 not a "responsive pleading" within the meaning of Rule 15(a). Crum
 18 v. Circus Circus Enters., 231 F.3d 1129, 1130 n.3 (9th Cir. 2000);
 19 Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1530 (9th Cir. 1995).
 20 "Neither the filing nor granting of such a motion before answer
 21 terminates the right to amend" Doe v. United States, 58 F.3d
 22 494, 497 (9th Cir. 1995) (quoting Schreiber Distrib. Co. v. Serv-Well
 23 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)) (internal
 24 quotations omitted). Thus, plaintiff is entitled to proceed on his
 25 amended complaint, which supercedes the original complaint. See Loux
 26 v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967).

³ Following the hearing on defendants' motion, plaintiff filed
 a second amended complaint without leave of court. That second
 amended complaint was stricken from the record. (See Order filed
 January 20, 2005.) On June 9, 2005, plaintiff filed another second
 amended complaint and on June 10, 2005, he filed a notice of motion
 to filed that second amended complaint, noticing the hearing for July
 8, 2005. However, as of June 9, 2005, a second amended complaint was
 not yet authorized. Therefore, although plaintiff now will be
 granted leave to file a second amended complaint, the second amended
 complaint filed on June 9, 2005, will be stricken from the record.
 Further, plaintiff's motion for leave to file his complaint will
 be denied as moot and the hearing on that motion will be vacated.

1 as mooted. It may, however, proceed with the motion if the amendment
2 does not cure the defect.").

3 Plaintiff's amended complaint alleges that defendants
4 wrongfully convicted and imprisoned plaintiff in violation of his
5 constitutional rights. However, the court has determined that the
6 amended complaint does not contain a short and plain statement as
7 required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules
8 adopt a flexible pleading policy, a complaint must give fair notice
9 and state the elements of the claim plainly and succinctly. Jones v.
10 Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).

11 Plaintiff must allege with at least some degree of particularity
12 overt acts which defendants engaged in that support plaintiff's
13 claim. Id.

14 The amended complaint, consisting of eight typed pages and
15 setting forth fifteen "counts," fails to meet these requirements.
16 Each of the fifteen counts is supported by only one or two sentences
17 of conclusory allegations. For example, Count Six alleges: "Hagwood
18 and Kaufman violated Robinson's right to be secure against
19 unreasonable search and seizure." (Am. Compl. at 6.) Count Seven
20 alleges: "Hagwood, Kaufman, Pangman, Olney, Reichle, Cunan, McGowan,
21 and Prouty violated Robinson's right to due process." (Id.) Thus,
22 the precise nature of plaintiff's intended claims are unclear. As
23 such, the court finds that the amended complaint's allegations do not
24 amount to a short plain statement of a claim showing that plaintiff

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1 is entitled to relief or set forth any factual allegations giving
2 rise to federal jurisdiction.⁴ See Fed. R. Civ. P. 8(a)(1), (2).

3 The court recognizes that the amended complaint makes
4 reference to 42 U.S.C. § 1983 and various constitutional rights.
5 However, the amended complaint does not allege how the conduct
6 complained of has resulted in a deprivation of a right, privilege or
7 immunity secured by the Constitution or federal law by a person
8 acting under color of state law. L.W. v. Grubbs, 974 F.2d 119, 120
9 (9th Cir. 1992); Lopez v. Dept. of Health Serv., 939 F.2d 881, 883
10 (9th Cir. 1991). The Civil Rights Act provides as follows:

11 Every person who, under color of [state law] ...
12 subjects, or causes to be subjected, any citizen
13 of the United States ... to the deprivation of
14 any rights, privileges, or immunities secured by
the Constitution ... shall be liable to the party
injured in an action at law, suit in equity, or
other proper proceeding for redress.

15 42 U.S.C. § 1983. The statute requires that there be an actual
16 connection or link between the actions of the defendants and the
17 deprivation alleged to have been suffered by plaintiff. See Monell
18 v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode,
19 423 U.S. 362 (1976). "A person 'subjects' another to the deprivation
20 of a constitutional right, within the meaning of § 1983, if he does

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22 ⁴ Plaintiff asserted at the hearing on defendants' motion that
23 the nature of his claims are explicated in his declaration which was
24 submitted in connection with his opposition to the motion. However,
25 that declaration is not attached to the amended complaint. Cf. Parks
26 School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.
1995) (stating court may consider documents attached to complaint in
evaluating motion to dismiss). Moreover, even if that declaration
were attached, it would not save the amended complaint. The 24-page,
593-paragraph declaration does not amount to a short and plain
statement of a claim.

1 an affirmative act, participates in another's affirmative acts or
2 omits to perform an act which he is legally required to do that
3 causes the deprivation of which complaint is made." Johnson v.
4 Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

5 Moreover, supervisory personnel such as Plumas County
6 District Attorney James Reichle are generally not liable under § 1983
7 for the actions of their employees under a theory of respondeat
8 superior.⁵ Therefore, when a named defendant holds a supervisory
9 position, the causal link between the defendant and the claimed
10 constitutional violation must be specifically alleged. See Fayle v.
11 Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589
12 F.2d 438, 441 (9th Cir. 1978). "A supervisor is only liable for
13 constitutional violations of his subordinates if the supervisor
14 participated in or directed the violations, or knew of the violations
15 and failed to act to prevent them." Taylor v. List, 880 F.2d 1040,
16 1045 (9th Cir. 1989) (citing Ybarra v. Reno Thunderbird Mobile Home
17 Village, 723 F.2d 675, 680-81 (9th Cir. 1984)). Vague and conclusory
18 allegations concerning the involvement of official personnel in civil
19 rights violations are not sufficient. See Ivey, 673 F.2d at 268.

20 Finally, the amended complaint also fails to sufficiently
21 allege a claim of municipal liability arising from any policy of
22 _____

23 ⁵ As discussed at the hearing on the pending motion, to the
24 extent this action concerns the actions of defendant Reichle in
25 connection with criminal proceedings held in state court, his alleged
26 conduct -- and any similar conduct by his deputies, defendants Cunan
and McGowan -- is likely of the kind that would entitle these
defendants to absolute prosecutorial immunity under § 1983. See KRL
v. Moore, 384 F.3d 1105, 1110-11 (9th Cir. 2004).

1 Plumas County. See Monell, 436 U.S. at 690-91. Plaintiff's amended
2 complaint contains no specific allegations regarding any policy or
3 custom of Plumas County resulting in a deprivation of constitutional
4 rights; any decision by an official with final policy-making
5 authority which resulted in a violation of plaintiff's rights; or any
6 such official's ratification of an unconstitutional decision by a
7 subordinate. See Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th
8 Cir. 1992).

9 Because of these deficiencies, plaintiff's amended
10 complaint must be dismissed. Nonetheless, the court will grant leave
11 to file a second amended complaint. If plaintiff chooses to amend
12 the amended complaint, he must set forth the grounds upon which the
13 court's jurisdiction depends. Moreover, the second amended complaint
14 must include clear and concise factual allegations describing the
15 events which underlie plaintiff's claims.

16 In addition, plaintiff is informed that the court cannot
17 refer to a prior pleading in order to make plaintiff's second amended
18 complaint complete. Local Rule 15-220 requires that an amended
19 complaint be complete in itself without reference to any prior
20 pleading. This is because, as a general rule, an amended complaint
21 supersedes the original complaint. See Loux, 375 F.2d at 57. Once
22 plaintiff files a second amended complaint, the earlier pleadings no
23 longer serve any function in the case. Therefore, in a second
24 amended complaint, as in an original complaint, each claim and the
25 involvement of each defendant must be sufficiently alleged. Any

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1 amended pleading which fails to provide the necessary factual
2 description will likely be dismissed.

3 Plaintiff is forewarned that the failure to file a second
4 amended complaint which complies with this order will result in a
5 recommendation that this action be dismissed.

6 **CONCLUSION**

7 Accordingly, IT IS HEREBY ORDERED that:

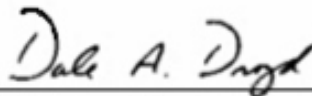
8 1. Defendants' motion to dismiss is granted;

9 2. Plaintiff's amended complaint is dismissed;

10 3. Plaintiff is granted thirty (30) days from the date of
11 service of this order to file a second amended complaint that
12 complies with the Federal Rules of Civil Procedure and the Local
13 Rules of Practice; the second amended complaint, if any, must bear
14 the docket number assigned this case and must be labeled "Second
15 Amended Complaint." Plaintiff must file an original and two copies
16 of the second amended complaint; and

17 4. Plaintiff's motion for leave to file a second amended
18 complaint (Doc. no. 57) is denied as moot and the July 8, 2005,
19 hearing on that motion is vacated.

20 DATED: June 29, 2005.

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22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

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